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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	77324270
Applicant	Navy Exchange Service Command ("NEXCOM")
Applied for Mark	USN
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**IN UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re:)
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)
Application Serial No. 77324270)
)
Applicant: Navy Exchange Service Command)
)
Filing Date: November 8, 2007)
)
Mark: USN (And Design))
)

APPLICANT'S APPEAL BRIEF

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APPEAL BRIEF

The Navy Exchange Service Command, a federal government instrumentality under the United States Navy (hereafter “Applicant,” “NEXCOM,” or “Navy”), submits this Appeal Brief in support of its appeal of the Examining Attorney’s October 26, 2010 Final Office Action relative to Application filed November 8, 2007, Serial No. 77324270, for design mark consisting of an Anchor/USS Constitution/Eagle logo above the letters “USN” and on a background of digital pattern in light grey, deck grey, black, and navy blue.

STATEMENT OF ISSUE

Whether Applicant’s mark, consisting of a digital pattern of colors and an emblem design (“Applicant’s Mark” or “the Mark”) for “cotton, nylon blends, and nylon fabrics which will all be used in the manufacture of merchandise, including but not limited to clothing, to be sold to authorized patrons of the military exchanges pursuant to Armed Services Exchange Regulations” (“Applicant’s Goods” or “the Goods”) is functional.

RECITATION OF THE FACTS

Applicant is the Navy Exchange Service Command (NEXCOM), a federal government instrumentality under the Department of Navy, which operates the Navy Exchange retail stores on Navy bases throughout the world. Since NEXCOM’s inception in 1946, its mission has been to provide its customers quality goods and services at a savings and to contribute to quality of life programs. The Navy Exchange (NEX) is one of the Navy Exchange Service Command’s (NEXCOM) six primary business programs which also include the Ships Stores Program, Uniform Program Management Office, Navy Clothing and Textile Research Facility (NCTRF), Navy Lodge Program, and Telecommunications Program Office. NEXCOM contributes 70% of its profits to Navy’s Morale, Welfare, and Recreation (MWR) program.

NEXCOM owns several design and word marks under which it sells merchandise in its NEXs. With regard to the four-color, pixel design mark at issue in this action, which NEXCOM first started using in 2008, NEXCOM sells a variety of products using the design mark, such as backpacks, duffels, laptop cases, shaving kits, wallets, coasters, cups, mugs, foam drink holders, commemorative coins and medallions, stuffed and plush toys, pencils, electronic accessories, mobile device cases, scrapbooks, children's clothes, bibs, blankets, decals, uniforms, caps, blouses, trousers, parkas, t-shirts, and sweat shirts. The design mark may appear on the merchandise as an embellishment within text, or a stripe of the design mark down the side of a pant or shirt, or a portion of the whole product, or it may cover the entire product. NEXCOM also licenses the manufacture and sale of fabric containing the mark. NEXCOM's assortment of goods continues to expand, and NEXCOM has several applications for registration pending in this regard. So far, registration was obtained in International Class 021 (Reg. # 3852454).

On November 8, 2007, Applicant filed its application to register the subject Mark, Serial No. 77324270, for design consisting of Anchor/USS Constitution/Eagle logo (ACE logo) above the word element "USN," and on background of digital pattern in greys, black, and navy blue. On October 26, 2010, the Examining Attorney issued a final refusal of registration on the grounds that Applicant's Mark is allegedly. The Final Refusal is based entirely on the four-color, pixilated background rather than the ACE logo or "USN" elements of the Mark. (NEXCOM obtained registration of the line drawing of the ACE logo in 2009, Reg. # 3616590.)

ARGUMENT

NEXCOM'S MARK IS NOT FUNCTIONAL AND SHOULD BE REGISTERED

The Examining Attorney contends that Applicant's Mark is functional. Applicant respectfully asserts that the Examining Attorney has not demonstrated a *prima facie* case that

Applicant's Mark is functional because she has not offered enough evidentiary support for the refusal in accordance with TMEP 1202.02(a)(iv). Only if this burden is met does the burden shift to Applicant to rebut the Examining Attorney's *prima facie* case of functionality. *Textron, Inc. v. U.S. Int'l Trade Comm'n*, 224 U.S.P.Q. 625, 629 (Fed. Cir. 1985); *In re R.M. Smith, Inc.*, 222 U.S.P.Q. 1, 3 (Fed. Cir. 1984); *In re Bio-Medicus Inc.*, 31 U.S.P.Q.2d 1254, 1257 n.5 (T.T.A.B. 1993).

The Examining Attorney states that a mark is functional if it is "essential to the use or purpose of the [product]" or "it affects the cost or quality of the [product]." *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 33, 58 USPQ2d 1001, 1006 (2001); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165, 34 USPQ2d 1161, 1163-64 (1995); TMEP §1202.02(a)(iii)(A). "Essential" is defined as "absolutely necessary; indispensable." See Exhibit A attached to 9/19/2009 Response to Office Action. The applied-for mark is neither absolutely necessary nor indispensable to the purpose of Applicant's Goods.

A preliminary issue central to this case is the Examining Attorney's persistence in treating Applicant's Mark as a single color mark and attendant refusal to acknowledge that Applicant's Mark consists of several different colors arranged in a pattern design. Final Office Action, Oct. 26, 2010, p. 2. The Examining Attorney ignores the presence of the acronym "USN" and the "schooner ship, anchor, and bald eagle" logo in the drawing. Further, the Examining Attorney ignores the fact that the pattern design is an integral feature of Applicant's Mark that contributes to an overall impression of the Mark that is greater than the sum of any one feature and is not functional. Leaving aside the presence of the "USN" acronym and logo, contrary to the Examining Attorney's stated position to the effect that Applicant's Mark is nothing more than a color mark, the overarching theme of the Examining Attorney's arguments is that **the**

pattern of the mark is functional. Nowhere in the Final Office Action does the Examining Attorney prove or even argue that the colors black, deck grey, light grey, and/or navy blue possess any functional attributes.¹ Further, the record is completely silent with respect to any competitive advantage inherent in these specific colors. To the contrary, the Examining Attorney's case is predicated almost entirely on the argument that the Navy developed a uniform with a multicolored **pattern** because such a uniform would wear better than a solid color uniform. Final Office Action, Oct. 26, 2010, p. 3. The description of goods in the application for this Mark does not even mention uniforms.

The Examining Attorney cannot have it both ways. If Applicant's Mark is merely a color mark, then the Examining Attorney must make a *prima facie* case that the colors at issue—black, deck grey, light grey, and/or navy blue—are functional. If the alleged functionality arises from the pattern, then the Examining Attorney must make a *prima facie* case that the pattern is functional, which would require showing, *inter alia*, that Applicant's pattern is uniquely suited to the alleged function, that alternative designs are unavailable and that the design results from a comparatively simple or inexpensive method of manufacture. The Examining Attorney has not shown any. Not surprisingly, because the Examining Attorney contends, on the one hand, that issue is one of the functionality of single colors, while, on the other hand, arguing that functionality arises from pattern design, the record fails to establish a *prima facie* case of functionality on the basis of either the colors or the pattern.

Instead, the final Office Action cites precedent holding single color marks to be function-

¹ At one point earlier in the prosecution of the Application, the Examining Attorney maintained that Applicant's Mark provided an alleged camouflaging feature. In response to Applicant's arguments, however, the Examining Attorney appears to have withdrawn the alleged camouflaging feature as a basis for the asserted functionality refusal. In the Final Office Action, the Examining Attorney states that "Although the mark as applied to the goods *may not be necessary to disguise or conceal* Navy personnel, the mark still yields a utilitarian or functional advantage." Final Office Action, Oct. 26, 2010, p. 3 (emphasis added). The Final Office Action then proceeds to argue solely that Applicant's Mark is functional because the Mark will enable the uniform to wear better, withstand wrinkles and stains, and the like.

al as applied to the goods, specifically, the color black for outboard motors, the color purple for sand paper, and the color pink for surgical wound dressings. *Brunswick Corp. v. British Seagull Ltd.*, 35 F.3d 1527, 32 USPQ2d 1120 (Fed. Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995); *Saint-Gobain Corp. v. 3M Co.*, 90 USPQ2d 1425 (TTAB 2007); and, *In re Ferris Corp.*, 59 USPQ2d 1587 (TTAB 2000), respectively. None of those cases involved marks consisting of a pattern design comprised of multiple colors, and thus none are applicable to the present case.² Further, in each of those cases, the record established a functional nexus between the color at issue and the goods on which the mark was used such that it would have impeded competition to monopolize the color at issue. In *Brunswick Corp.*, it was established that the color black was functional for outboard motors because it provided recognizable competitive advantages in terms of being compatible with a wide variety of boat colors and making the engines appear smaller. *Brunswick Corp.*, 32 USPQ2d at 1122-24. In *Saint-Gobain Corp.*, it was shown that purple for coated abrasives was functional because coated abrasive manufacturers have a competitive need to be able to use various shades of purple and “[i]n the field of coated abrasives, color serves a myriad of functions, including color coding.” *Saint-Gobain Corp.*, 90 USPQ2d at 14-47-48. In *Ferris Corp.*, it was shown that the color pink used on surgical wound dressings is functional because pink closely resembles the color of Caucasian human skin. *In re Ferris Corp.*, 59 USPQ2d 1589-91.

In the present case, the record contains no evidence that the colors in Applicant’s Mark,

² The Office Action also cites *Inwood Labs, Inc. v. Ives Labs, Inc.*, 456 U.S. 844, 855 n. 10, 214 USPQ 1, 4 n. 10 (1983) for the proposition that “[i]n general terms, a product feature is functional if it is essential to the use or purpose of the article, or if it affects the cost or quality of the article.” (cites omitted). *Inwood* involved a pharmaceutical preparation available in different doses that were identified by different color markings. The lower dose was dispensed in a blue capsule and the higher dose was dispensed in a combination blue and red capsule. Although the higher doses involved an alleged mark featuring two colors, the case is distinguishable from the present case because the patent for the underlying pharmaceutical preparation had expired, the colors were deemed to be a necessary color coding system to enable manufacturers of comparable generic pharmaceuticals to identify the proper dosages, and no pattern design was involved.

namely, black, deck grey, light grey, and/or navy blue, have any functional purpose. Consequently, while the Examining Attorney persists in analyzing Applicant's Mark as a color mark, the arguments and evidence of record segue into a lengthy yet general discussion of the Navy's desire to adopt a uniform pattern that wears better than a single color uniform. Final Office Action, Oct. 26, 2010, pp. 3-6. The Examining Attorney's refusal constitutes sleight of hand. Although the rationale for the refusal is tied to the alleged functionality of the pattern of Applicant's Mark, by persisting in analyzing Applicant's Mark as a color mark and applying precedent involving single color marks the Examining Attorney is able to ignore cases holding that a combination of colors or other trade dress elements is protectable. *See, e.g., Vaughn Mfg. Co. v. Brikam Intern, Inc.*, 814 F.2d 346, 1 USPQ2d 2067 (7th Cir. 1987) (functionality argument "fails by focusing on the individual elements [colors] rather than the overall trade dress"); *Sportsac, Inc. v. K Mart Corp.*, 754 F.2d 71, 76 (2d Cir. N.Y. 1985) (proper focus of functionality inquiry is on the particular combination and arrangement of design elements); *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1259, 58 U.S.P.Q.2d 1881 (9th Cir. 2001)(size, placement, layout, color combination, etc. presented sufficient evidence to raise issue that trade dress was non-functional); *In re American Home Products Corp.*, 226 U.S.P.Q. 327 (TTAB 1985) (reversing refusal to register the colors pink, white and yellow applied to a medicinal tablet, where the refusal was based on the asserted ground that the matter presented for registration was a non-distinctive combination of shape and color which failed to function as a trademark).

In sum, the record does not establish a *prima facie* case that Applicant's Mark is functional. There is no evidence to support even a threshold showing that the colors black, deck grey, light grey, and/or navy blue serve a functional purpose. Similarly, while the Examining Attorney's refusal focuses on the Navy's desire to have a uniform that wears well, there is no

evidence that the specific pattern design of Applicant's Mark provides a functional or competitive advantage under the relevant "*Morton-Norwich*" factors, which both the Trademark Trial and Appeal Board ("TTAB") and the U.S. Court of Appeals for the Federal Circuit consider as a threshold issue in determining whether or not a proposed mark is functional. *In re Morton-Norwich Products, Inc.*, 671 F.2d 1332, 1340-1341, 213 USPQ 9, 15-16 (C.C.P.A. 1982).

Regardless of whether the Examining Attorney's analysis focuses on the colors, the pattern, or some combination of both, the Supreme Court decision in *Qualitex Co. v. Jacobson Products Co.* 514 U.S. 159, 34 USPQ2d 1161 (1995), is directly on point and dictates that registration of Applicant's Mark is appropriate. In holding that the color green-gold for dry cleaning press pads was protectable as a trademark, the Supreme Court stated:

Indeed, the District Court, in this case, entered findings (accepted by the Ninth Circuit) that show Qualitex's green-gold press pad color has met these requirements [for qualification as a trademark]. The green-gold color acts as a symbol. Having developed secondary meaning (for customers identified the green-gold color as Qualitex's), it identifies the press pads' source. And, the green-gold color serves no other function. (*Although it is important to use some color on press pads to avoid noticeable stains, the court found "no competitive need in the press pad industry for the green-gold color, since other colors are equally usable."* 21 USPQ2d at 1460.)

Qualitex, 34 USPQ2d at 1164 (emphasis added).

Significant to this case is the fact that the Supreme Court recognized trademark rights in a color that served the incidental purpose of avoiding stains, where it was found that the color otherwise served no function and was not needed by competitors in the industry due to the fact that other colors were equally usable. This Supreme Court precedent defeats any assertion by the Examining Attorney that Applicant's Mark is functional merely because the dark colors and patterns comprising Applicant's Mark wear better by hiding stains and wrinkles.

In the instant case, analysis of the four "*Morton-Norwich*" factors for determining whether or not a proposed mark is functional confirms that, as in *Qualitex*, here alternate colors and

patterns other than those in Applicant's Mark are equally useable to hide stains and wrinkles, such that there is no non-reputational competitive advantage inherent in Applicant's Mark.

The four *Morton-Norwich* factors are:

- (1) the existence of a utility patent that discloses the utilitarian advantages of the design sought to be registered;
- (2) advertising by the applicant that touts the utilitarian advantages of the design;
- (3) facts showing the availability of alternative designs; and
- (4) facts pertaining to whether the design results from a comparatively simple or inexpensive method of manufacture.

Morton-Norwich, 213 USPQ 9, 15-16.

When considered against the backdrop of *Qualitex*, these four factors further weigh decidedly in favor of a finding that Applicant's Mark is registrable.

Applicant's Mark is not covered by any existing or expired utility patent; hence the first *Morton-Norwich* factor weighs against a finding of functionality and in favor of registration.

The second *Morton-Norwich* factor also weighs against a finding a functionality. The Examining Attorney seems satisfied with Applicant's previously-submitted evidence that the Navy did not intend the mark to have any camouflage function. However, in the Final Office Action, the Examining Attorney states that "[a]lthough the mark as applied to the goods may not be necessary to disguise or conceal Navy personnel, the mark still yields a utilitarian or functional advantage." Final Office Action, Oct. 26, 2010, p. 3. The Final Office Action then proceeds to argue solely that Applicant's Mark is functional because the Mark will enable the uniform to wear better, withstand wrinkles and stains, and the like. To the extent the Navy may sometimes indicate that a color pattern was chosen to minimize the effects of heavy wear and wrinkles, this is tantamount to puffery merely promoting the roll out of the new Navy uniform. The Navy

makes no claim that either the colors or the pattern design in Applicant's Mark is uniquely capable of minimizing wrinkles and stains, or that the Mark is otherwise superior to other available colors and/or pattern designs. Such features arise from virtually any pattern design and are not an essential attribute of Applicant's Mark. As explained further below with regard to alternate designs, any color patterns can and do accomplish the same thing. The mere fact that Applicant wants a uniform design that better withstands wear and wrinkles—a feature inherent in any patterned clothing—does not establish that Applicant's Mark or uniforms are somehow superior to other clothing patterns. Accordingly, the second *Morton-Norwich* factor weighs in favor of registration of Applicant's Mark.

The third *Morton-Norwich* factor, the availability of alternative designs, also weighs in favor of a finding that Applicant's Mark is not functional. The record is devoid of any evidence that Applicant's Mark would deprive competitors of colors and designs for which no alternative colors or design exist. There is nothing in the record that suggest that Applicant's colors and design are the only means, or among a limited universe of means, for designing a uniform that wears well and resist stains and wrinkles. There are infinite variations of colors and patterns that similarly would wear well, and the Examining Attorney has not produced any evidence to suggest that Applicant's Mark would either monopolize colors and designs that wear well or otherwise deprive competitors of other available designs that similarly wear well. In fact, the Examining Attorney does not ascribe to the colors black, deck grey, light grey, and/or navy blue the type of functional nexus with the respect to the goods that was present in *Brunswick Corp.*, *Saint-Gobain Corp.*, and *In Ferris Corp.* There is nothing in the record to suggest that Applicant's colors possess a functional advantage that competitors would desire to emulate, let alone be unable to achieve through alternate designs. In fact, any random design in dark or muted

colors would provide the same attributes that provide the basis of the Examining Attorney's asserted refusal. See, for example, evidence showing various camouflage patterns in muted colors, attached to 9/19/2009 Response to Office Action as Exhibit D.

The existence of alternative pixilated designs suggests that applicant's design is inherently distinctive and not functional. See, for example, *W.T. Rogers Co. v. Keene*, 778 F.2d 334, 339 (7th Cir. 1985) ("If the feature is ornamental, fanciful, decorative, like the patterns on a piece of china or of silverware, then the manufacturer can use it as his name, his symbol, his identifying mark. Ornamental, fanciful shapes and patterns are not in short supply, so appropriating one of them to serve as an identifying mark does not take away from any competitor something that he needs in order to make a competing brand."); *Shuffle Master Inc. v. Awada*, 2006 WL 2547091 (D. Nev. 2006) ("The availability of alternative table designs for a poker based game meant that the trade dress of the product could be inherently distinctive and that secondary meaning was not necessarily required to demonstrate distinctiveness, even though the design elements may have some functional aspects.") Moreover, the mere fact that a product configuration has utility, or that aspects of a product are functional, does not render the configuration unregistrable. *In re Morton-Norwich Products, Inc.*, 671 F.2d 1332, 213 USPQ 9 (C.C.P.A. 1982); *Shuffle Master Inc. v. Awada*, *supra*.

Although the Supreme Court has held it incorrect to try to comprehensively define functionality based solely only competitors' needed to copy that design in order to compete effectively, *TrafFix*, 532 U.S. at 33, competitive need remains a significant consideration in functionality determinations in view of the fact that preservation of competition remains an important policy consideration underlying the functionality doctrine. *Valu Engineering, Inc. v. Rexnord Corp.*, 278 F.3d 1268, 1277, 61 USPQ2d 1422, 1428 (Fed. Cir. 2002). In the present

case, the plethora of alternative patterns available and the absence of a competitive need to adopt any particular colors or design—including those colors and designs reflected in Applicant’s Mark—confirm that Applicant’s Mark is not functional and is entitled to registration.

To the extent the Examining Attorney also asserts that the color pattern in Applicant’s Mark provides an advantage of hiding stains or wear-and-tear, this attribute is merely an incidental feature inherent to any patterned material. *See, for example*, claims made on various websites that patterns hide stains on: a new mother’s clothes (“...also remember that patterned shirts hide stains that babies make [or] leaking breast milk...”); stains on children’s clothes (“Buy your kids clothes with colorful patterns. Patterns hide stains and still look great.”); stains on chefs’ pants (“It’s traditional for chefs to wear black pants or houndstooth pants . . . because the pattern and/or dark color hides stains,...”); stains on outdoor furniture pads (“A busy pattern hides stains better.”); and stains on sofas (“The thing is, flower patterns hide stains.”). See Exhibit E attached to 9/19/2009 Response to Office Action.

The U.S. Patent and Trademark Office (“USPTO”) does not generally deny registration of marks that are patterns on clothing simply because patterns help hide stains better than solids. See, for example, the following registrations for patterns on clothing: Reg. No. 2730904 (plaid design on clothing, specimen is shirts); Reg. No. 2739278 (plaid design on clothing, specimen is shirts); Reg. No. 2399161 (Louis Vuitton design on clothing, specimen is jacket). See Exhibit F attached to 9/19/2009 Response to Office Action.

While Applicant is mindful that prior determinations are not binding on the USPTO, nonetheless, Applicant offers the above and below examples of prior determinations in keeping with the strong public policy in favor of consistency of decisions.

The Examining Attorney’s arguments specific to the alleged functionality of muted or

dark colors used on uniforms are also misplaced. Following are examples in which the USPTO has registered other marks comprising uniforms consisting of dark or drab colors and/or color patterns:

- the uniform of the U.S. Postal Service, featuring the colors dark blue, bluish-gray, bluish-black, silvery-white and red (Reg. No. 3061546);
- the uniform of the U.S. Postal Service, featuring the colors light blue, bluish-gray, and bluish-black (Reg. No. 3061551);
- the color chocolate brown registered by the United Parcel Service of America, Inc., applied to the entire surface of trucks and uniforms (Reg. No. 2901090);
- the uniform of the Dallas Mavericks professional basketball team featuring the colors blue and green (Reg. No. 2565444);
- the uniform of the Philadelphia Eagles professional football team featuring the color green (Reg. No. 1534709).

See Exhibit G attached to 9/19/2009 Response to Office Action. These registrations confirm that the USPTO accepts designs for uniforms—including patterns and colors—as protectable trademarks. Courts have held likewise. *See, Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200 (2d Cir. N.Y. 1979) (holding the uniform for the Dallas Cowboys’ cheerleaders was a protectable trademark). Presumably, all the owners of the above-mentioned marks hope that their clothing and colors are able to better withstand wear and stains. Nonetheless, the USPTO has clearly determined that such colors are not functional because any feature that would allegedly improve the products’ ability to withstand wear and stains is merely incidental and not “essential” to the use or function of the clothing and/or because any alternatively-patterned colors providing the same alleged benefits are readily available.

The Examining Attorney’s own evidence from a third-party (non-Navy, non-government) commercial website supports Applicant’s position where the website expressly states that “... the Navy Work Uniform (NWU) was chosen by surveyed sailors for consistency and longer life, rather than to disguise them at sea.” See Exhibit H attached to 9/19/2009 Response to Office Action. These properties are incidental to any standardized “uniform” clothing made with

durable fabric. Moreover, the official position of the Navy is that the Navy's color pattern was chosen as a source-identifier – “to give our Sailors a recognizable uniform apart from other services” and the specific Navy-related colors, including “deck gray” and “navy coverall blue” were thought appropriate to further identify the uniforms to their Navy source since they are colors associated with a maritime environment. A “multicolored pattern” was chosen because solid colors show heavy wear and wrinkles more predominantly. See Exhibit B attached to 9/19/2009 Response to Office Action.

For these reasons, the third *Morton-Norwich* factor, the availability of alternative designs, also weighs in favor of a finding that Applicant's Mark is not functional. As such, the Supreme Court decision in *Qualitex* dictates that registration of Applicant's Mark is appropriate in this case. There mere fact that colors and patterns, in general, may hide stains and wrinkles, does not establish that the colors and pattern design in Applicant's Marks are uniquely equipped to do so better than alternate colors and/or designs readily available to competitors.

The final *Morton-Norwich* factor, whether Applicant's design results from a comparatively simple or inexpensive method of manufacture (thereby giving Applicant a competitive advantage), also weighs against a finding of functionality. The design embodied in Applicant's Mark and Goods does not afford Applicant any advantage in terms of a simple or inexpensive process of manufacturing the goods. The digital pattern and logo that comprise Applicant's Mark are no less expensive to reproduce than any other pattern in other colors. See Declaration attached to 9/19/2009 Response to Office Action as Exhibit I.³ Accordingly, this fourth factor weighs in favor of registration of Applicant's mark.

³ The Examining Attorney asserts that uniforms that resist stains are less costly to maintain. Again, this is true of any dark or muted patterned clothing, and, in any event, is irrelevant. *Morton-Norwich* speaks to whether the design results from a comparatively simple or inexpensive *method of manufacture*. Further, any reduction in the wearer's laundry costs is more than offset by the fact that it would be less expensive for Applicant to produce clothing that did not contain the distinctive patterns and colors comprising Applicant's Mark.

Applicant notes that in the Examining Attorney's Final Office Action, rather than address the *Morton-Norwich* factors, the Examining Attorney takes great pains to prove that the Navy requires their personnel to maintain neat and clean uniforms and that patterned material helps accomplish that requirement. Applicant does not dispute these statements, but these facts are not at issue. At issue are whether the particular design provides advantages over other designs, whether alternative designs are available, and whether this particular design is easier to manufacture than alternative designs (*Morton-Norwich* factors #2 and #3). All these issues must be found in favor of Applicant.

In sum, Applicant's Mark as applied to the Goods is not essential to the use or purpose of the Goods and does not affect the cost or quality of the Goods. Applicant's Mark on its uniform Goods was designed to be a durable and attractive maritime-themed uniform that will wear well. Applicant's clothing items bearing its Mark are non-functional and the uniform items bearing the Mark are like any other uniforms containing source-identifying marks. The Mark should, therefore, be entitled to the same protections the USPTO has afforded previously registered designs for uniforms.

Applicant's color digital pattern is not essential to the use or function of the Goods, does not result from a simpler or less expensive manufacturing process, and thus does not afford the Navy any non-reputational advantage over competitors. Accordingly, This Board should find in Applicant favor.

SUMMARY

In conclusion, the Examining Attorney has not demonstrated a *prima facie* case that Applicant's Mark is functional, nor has she addressed the Norwich factors, which support Applicant's position that the Mark is not functional.

In view of the foregoing, Applicant respectfully submits that Applicant's Mark is entitled to registration and requests that the Trademark Trial and Appeal Board reverse the refusal to register Applicant's mark.